BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH HUGH WRIGHT	)	
Claimant	)	
	)	
VS.	)	
	)	
LB STEEL, LLC.	)	
Respondent	)	Docket No. **1,050,151**
	)	
AND	)	
	)	
TRAVELERS CASUALTY & SURETY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the January 7, 2011 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on April 20, 2011.

APPEARANCES

Ronald J. Laskowski of Topeka, Kansas, appeared for the claimant. Ronald A. Prichard of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that claimant's functional impairment was 25 percent. The parties further agreed claimant's wage loss was 100 percent and his task loss 88 percent.

ISSUES

The parties were unable to agree on the nature and extent of disability claimant suffered as a result of work-related repetitive trauma to his lower back. Claimant argued that he is permanently and totally disabled. After the regular hearing was held but on the date respondent's terminal date expired the claimant also requested a K.S.A. 44-512b

interest penalty for respondent's failure to pay claimant compensation before the Award based upon Dr. Prostic's uncontradicted functional impairment rating. Conversely, respondent argued the claimant was not permanently and totally disabled and that the request for a K.S.A. 44-512b interest penalty was not timely as a demand was not made at or before the regular hearing.

The Administrative Law Judge (ALJ) found claimant sustained a permanent total disability due to his work-related injury. The ALJ further found claimant's request for a K.S.A. 44-512b interest penalty was not timely and, consequently, denied the request.

Respondent requests review of whether the ALJ erred in finding claimant permanently and totally disabled. Respondent argues claimant is capable of engaging in substantial gainful employment as a security guard and therefore claimant would be entitled to permanent partial disability compensation based upon his percentage of work disability up to the statutory maximum of $100,000.

Claimant argues that respondent has not offered any evidence that claimant is realistically employable. Claimant further argues that he has restrictions, limited education, no transferable skills as well as no experience as a security guard. Consequently, claimant requests the ALJ's finding that claimant is permanently and totally disabled should be affirmed. Claimant further argues that he is entitled to an interest penalty based upon Dr. Prostic's uncontradicted functional impairment rating.

The issues for Board determination include the nature and extent of disability and whether claimant is entitled to a K.S.A. 44-512b interest penalty.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

At the time of the regular hearing, Kenneth Wright was 43-years-old with a high school education and a vocational certification as a welder. Claimant worked as a welder for Topeka Metal Specialties a/k/a LB Steel for 23 years. His job was to build Broderson cabs, snorkel lifts and Broce cabs made out of steel. Physically, he had to push these cabs in and out of the fixture and around on the floor. Over the course of time claimant began to notice that after moving these cabs around, he would get pain in his right buttocks and then into his right leg.

Claimant sought medical treatment at a Med-Assist. Dr. Huffman ordered an x-ray and prescribed a muscle relaxer as well as pain medication. Claimant was told to return

to work. He testified that he reported his injury to Jim McDonald, a supervisor. Respondent referred claimant to Dr. Donald Mead who diagnosed stenosis. An MRI was performed. The doctor ordered physical therapy, a work conditioning program and epidural steroid injections by Dr. Florin Nicolae which were all unsuccessful. Dr. Mead then referred claimant to Dr. Michael Smith.

On September 3, 2009, Dr. Smith performed a decompression and fusion at L5-S1 with a cage and screws. Physical therapy and work hardening were ordered post surgery. After claimant had reached maximum medical improvement on March 2, 2010, he continued to experience pain and Dr. Smith referred him to Dr. Veloor for pain management.

At the time of the regular hearing, claimant was taking Cyclobenzaprine and Tramadol as well as using Lidocaine patches for pain. He still has pain in his lower back and right buttocks with numbness. Claimant testified he has not worked since the injury nor has he searched for any jobs. The only job claimant has worked in the past 23 years was as a welder.

At claimant's attorney's request, Dr. Edward Prostic, board certified orthopedic surgeon, examined and evaluated the claimant on May 24, 2010. The doctor reviewed claimant's medical records, took a history from claimant and performed a physical examination. Tenderness was present diffusely but the greatest was at L4-5 in the midline. He also had mild hamstring tightness bilaterally both seated and supine. X-rays of the lumbar spine revealed a failure of segmentation at L5-S1, pedicle screw and rod fixation at L4-5 with evidence of a bone graft and grade 1 spondylolisthesis at L4-5. The doctor opined claimant's physical examination was consistent with his complaints of pain as well as the mechanism of his work-related injury. Dr. Prostic diagnosed claimant with post-operative decompression and fusion for spondylolisthesis at L4-5. The doctor limited claimant to light-duty employment with change of position as necessary for comfort. He should also avoid repetitious bending or twisting at the waist, forceful pushing or pulling, or use of vibrating equipment.

Based upon the AMA *Guides*[1], Dr. Prostic opined claimant has a 25 percent functional impairment to the body as a whole. The doctor reviewed the list of claimant's former work tasks prepared by Mr. Dick Santner and concluded claimant could no longer perform 7 of the 8 tasks for an 87.5 percent task loss. Dr. Prostic also opined it would be difficult for claimant to find a job in the open labor market. The doctor testified:

[1]American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> Q. You did formulate an opinion that Mr. Wright was subject to work restrictions. Have you conducted any type of analysis regarding whether or not Mr. Wright is or would be capable of accessing employment in the open labor market?
>
> A. Without additional training, he is going to have great difficulties finding a job in the open labor market.[2]

The doctor further testified that claimant's complaints of pain and need for surgery was caused by the repetitious forceful pushing which aggravated his preexisting spondylolisthesis.

Claimant testified that his limitations prevent him from performing any activity for a very long time period. Claimant testified:

> Q. And as you sit here today, Mr. Wright, do you think you are capable of working a full-time job based on your work skills and educational background and your condition?
>
> A. My limitations limit me from doing anything very long, and to work a job, you have to at least work there 4 hours or 2 hours, and that's way too long for me.[3]

Dick Santner, a vocational rehabilitation counselor, conducted a personal interview with claimant on July 7, 2010, at the request of claimant's attorney. He prepared a task list of 8 nonduplicative tasks claimant performed in the 15-year period before his injury. At the time of the interview, the claimant had been unemployed since June or July 2009, and was not looking for work. Mr. Santner thought claimant was perhaps capable of working as a security guard but with no experience in that area he would probably have a difficult time finding a job. And Mr. Santner opined that claimant would be very difficult to place in a job taking into consideration all of the functional restrictions.

> I would say the likelihood of this young man finding a job within the restrictions that have been outlined for him, given his educational background, given his work history, given the geographic labor market that would realistically be appropriate for him, that without additional specific training of some sort, the likelihood of him finding a job is somewhere between slim and none.[4]

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[2] Prostic Depo. at 13.

[3] R.H. Trans. at 26.

[4] Santner Depo. at 17.

Respondent does not dispute the fact that claimant has suffered a 94 percent work disability. But respondent argues claimant has not met his burden of proof to establish that he is entitled to compensation for a permanent total disability.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[5]

In *Wardlow*[6], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The ALJ analyzed the evidence in the following fashion:

> The only evidence presented as to Claimant's ability to engage in substantial and gainful employment was from Mr. Santner and Claimant. Respondent presented no evidence to contradict this testimony. Claimant did not know what kind of work he could currently do with his restrictions. Claimant's only work experience is as a welder and he has a high school education. Claimant has no

[5] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[6] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

> experience or training in office work or computers. Mr. Santner opined that Claimant might be able to work as a security guard. However, in the current labor market, it would be difficult for Claimant to find such a job because he has no experience as a security guard. Claimant's restrictions require that Claimant be able to change positions as needed and he can only lift thirty pounds occasionally and he should avoid repetitious bending and twisting and avoid the use of vibrating equipment. It is found and concluded that Claimant is permanently and totally disabled. Claimant is realistically unemployable based on Claimant's education, work restrictions and work history.[7]

Dr. Prostic opined that claimant would have great difficulties finding a job in the open labor market without additional training. Although Mr. Santner initially indicated claimant might be able to work as a security guard, after reading the medical restrictions he concluded that without additional training of some sort, the likelihood of claimant finding a job within his restrictions would be slim to none given claimant's educational background and work history. Claimant testified that his pain restricted him from engaging in activities for a sustained period of time and that he has an ongoing need for pain medications. Based upon a review of the entire evidentiary record, the Board finds claimant is essentially and realistically unable to engage in substantial gainful employment.

Claimant next argues that he is entitled to an interest penalty pursuant to K.S.A. 44-512b due to respondent's failure to pay compensation based upon Dr. Prostic's uncontradicted 25 percent whole person functional impairment rating.

On the same day respondent's terminal date expired, claimant faxed a letter to the ALJ and respondent's counsel demanding K.S.A. 44-512b interest penalties. The letter requested payment prior to the award of permanent partial disability benefits based upon Dr. Prostic's uncontroverted impairment rating. The claimant subsequently listed the request for K.S.A. 44-512b interest penalties as an issue in his submission letter to the ALJ. Respondent replied to the ALJ and claimant's counsel by letter transmitted by fax noting the request for a K.S.A. 44-512b interest penalty was not made at the regular hearing and consequently was not timely. The same argument was included in respondent's submission letter to the ALJ.

As previously noted, the ALJ cited Board decisions for the proposition that a request for a K.S.A. 44-512b interest penalty must be made at the regular hearing in order to allow a due process hearing for the parties to present evidence on the issue of whether there was just cause or excuse to withhold payment. The ALJ then denied claimant's request for an interest penalty because claimant did not raise the issue until after the regular hearing had been held.

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[7] ALJ Award (Jan. 7, 2011) at 5.

Claimant argues that he did not know there was a basis to request an interest penalty until respondent's terminal date expired and it was then clear that there was no evidence to contradict Dr. Prostic's functional impairment rating. Consequently, payment of that amount should have been tendered before the award as the only issue was the nature and extent of disability.

The Workers Compensation Act (Act) is designed to be self-enacting. The legislature intended that employers and insurance companies would voluntarily pay injured workers without first being ordered. If that is not the case, then the Act provides that injured workers shall be entitled to interest when an employer or insurance carrier did not have a legitimate reason for failing to pay compensation before an award. The Act provides:

> (a) Whenever the administrative law judge or board finds, **upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing**, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due. (Emphasis added)[8]

Thus, under K.S.A. 44-512b, the time for requesting pre-award interest is at the time of the first full hearing (a.k.a. the regular hearing) or such other time as a hearing on the request can be scheduled and heard before an award is entered by the ALJ. That procedure allows the parties to present evidence on the issue of whether there was just cause or excuse to withhold payment. Here, claimant failed to request pre-award interest until the respondent's terminal date expired. Moreover, claimant did not request a hearing on the issue as required by the statute. As such, claimant's argument that the minimum amount due should have been paid in advance of the award was not properly presented to the ALJ

In the Board decision of *Minden*[9], the Board held the time for requesting pre-award interest is at the time of the first full hearing (referred to as the K.S.A. 44-523 hearing or regular hearing before the administrative law judge). The Board reasoned that procedure allowed the parties to present evidence on the issue of whether there was just cause or

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[8] K.S.A. 44-512b(a).

[9] *Minden v. Paola Housing Authority*, No. 1,025,883, 2009 WL 1314316 (Kan. WCAB April 24, 2009).

excuse to withhold payment of benefits. The Board also suggested there was incongruity between K.S.A. 44-512b, which provided interest penalty, and K.S.A. 44-556(b), which permitted employers and their insurance carriers to withhold the payment of disability compensation that accrued before the 10-week period preceding the Board's decision. K.S.A. 2008 Supp. 44-556(b) provides:

> Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

And when claims are appealed to this Board, K.S.A. 2008 Supp. 44-551(i)(2)(C) provides that only medical compensation must be provided during the pendency of the appeal and that is only when compensability is not an issue.

Simply stated, the Act provides that interest can be assessed under K.S.A. 44-512b for the failure to pay compensation that could be withheld pending an appeal. This apparent contradiction could be explained by interpreting the statutes to require that any amount not in dispute should be paid.

Claimant's arguments are somewhat persuasive in that he did not know **if** there would be **a** defense raised to his functional rating until the last day for respondent to present evidence had passed. But the Act restricts when a worker may request an interest penalty for the failure to pay compensation before an award. As previously noted, in *Minden*, the Board interpreted K.S.A. 44-512b and concluded the request for interest penalty should be made at the time of the regular hearing. In this instance, the claimant could have requested an additional hearing to address the issue of the interest penalty and thus preserved the issue by having a hearing in order to satisfy fundamental due process requirements. But based upon the facts of this case, the Board is not persuaded to deviate from its holding in *Minden*. Accordingly, the Board holds that claimant's present request for interest is untimely as the request should have been made at or before the regular hearing, or the K.S.A. 44-523 hearing referred to in K.S.A. 44-512b should have been requested and heard before the issuance of the Award.

In conclusion, the Order Denying Pre-Award Interest should be affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated January 7, 2011, is affirmed.

IT IS SO ORDERED.

Dated this 13th day of May, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Ronald J. Laskowski, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge